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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 FIRST NATIONAL INSURANCE) CIV-S-04-0836 GEB JFM
11 COMPANY OF AMERICA,)
12 Plaintiff,) ORDER
13 v.)
14 MBA CONSTRUCTION, et al.)
15 Defendants.)
_____)

16 Defendant MBA Construction ("Mack") moves for a stay of this
17 action until the completion of a state court action in Shasta County
18 Superior Court ("State Case") or, in the alternative, for a
19 continuance of the trial date for approximately six months. Plaintiff
20 opposes the motion.

21 In the State Case, Mack sued "the Redding Unified School
22 District ("School") alleging, among other things, breach of contract
23 for work performed on the Sequoia Middle School Auditorium for which
24 Mack was not fully paid by the School." (Def.'s Mot. to Stay at 1.)
25 Mack contends that "the facts and issues [in this action and the State
26 Case] are virtually the same," and "it is likely that most, if not all
27 issues [in this action] will be resolved in the State Case." (Id. at
28 4.) Mack also "seeks a continuance based on unavailability of

1 counsel" since Mack's trial counsel "has conflicts with" the trial
2 date currently set in this action. (Id. at 4-5.) Mack contends that
3 its motion "is not brought . . . for any lack of diligence in
4 preparing for the Federal Case trial"; a continuance would be useful
5 to Mack since it would "slow First National's accrual of attorneys
6 fees in the Federal Case and narrow issues related to the payment of
7 subcontractors, and [allow for] analysis of construction delay damages
8 through expert testimony in the State Case"; "the wait or slight
9 inconvenience [of continuing the trial] is offset by the convenience
10 which will be served by having the State Case finalized so as to make
11 more clear the Federal Case issues and liability"; and Mack will
12 suffer great prejudice because it "is currently having to prosecute
13 one action in state court and defend another action based on the same
14 facts in federal court." (Def.'s Mot. at 5, 6.)

15 Plaintiff counters that "[t]here is no reason to stay this
16 case based on the School District Action." (Pl.'s Opp'n at 3.)
17 Plaintiff contends that it "is entitled to recover its damages from
18 the Defendants *regardless* of whether Mack Construction is successful
19 in its attempt to pass same through to the School District," and
20 "there is no legal reason why particularly First National should be
21 forced to subsume its claims against Mack Construction to Mack
22 Construction's recovery in the School District Action." (Id. at 2.)
23 Plaintiff contends Mack's motion should be denied since Plaintiff will
24 be prejudiced by a stay or continuation of this case; this action and
25 the State Case do not involve the same parties or the same issues;
26 Mack's counsel has known about the trial date in this action for over
27 a year; there is no assurance that the State Case will actually go to
28 trial in October since it has already been continued several times;

1 Mack has evaded discovery in this action; and this action is ripe.

2 (Id. at 4-11.)

3 Federal Rule of Civil Procedure 16(b) states that a
4 scheduling order "shall not be modified except upon a showing of good
5 cause." "Rule 16's 'good cause' standard focuses on the diligence of
6 the party seeking amendment." Jackson v. Laureate, Inc., 186 F.R.D.
7 605, 607 (E.D. Cal. 1999) (citing Johnson v. Mammoth Recreations,
8 Inc., 975 F.2d 604, 609 (9th Cir. 1992)). "Because good-faith
9 compliance with Rule 16 plays an important role in [the case
10 management] process, not only must parties participate from the outset
11 in creating a workable Rule 16 scheduling order but they must also
12 diligently attempt to adhere to that schedule throughout the
13 subsequent course of the litigation." Jackson, 186 F.R.D. at 607
14 (internal citation and quotation marks omitted). The parties' Joint
15 Status Report, filed August 16, 2004, indicated that "the present
16 action by First National against the Defendants is not dependent upon
17 resolution of the [State Case] and should not be affected thereby."
18 (Joint Status Report at 6.) Furthermore, Mack has not shown why the
19 "conflicts" that its trial counsel currently faces could not have been
20 avoided.

21 Since Mack's present position about trying the State Case
22 before trying this action is contrary to its position in the Joint
23 Status Report, Mack has not shown that it diligently assisted the
24 Court in creating a workable Rule 16 order. The Court used the
25 parties' Joint Status Report when scheduling trial in the Status
26 (Pretrial Scheduling) Order. Here, Mack fails to explain why it
27 should not be bound by its indication in the Joint Status Report that
28 the trial of this action could be scheduled regardless of when the

1 State Case is resolved. Having so indicated, Mack now bears the
2 reasonably foreseeable consequences of its failure to have brought its
3 present position to the scheduling judge before the Status (Pretrial
4 Scheduling) Order was created. See In re San Juan Dupont Plaza Hotel
5 Fire Litig., 11 F.3d 220, 228, 229 (1st Cir. 1997) (stating it is
6 essential "that counsel collaborate with the trial judge from the
7 outset in fashioning workable programmatic procedures" or counsel must
8 "bear the reasonably foreseeable consequences for their failure to do
9 so."). Further, Mack has not shown that it diligently attempted to
10 adhere to the schedule set forth in the Status (Pretrial Scheduling)
11 Order, since Mack has not explained why it could not have avoided what
12 it states are trial "conflicts."

13 For the stated reasons, Mack has not shown that good cause
14 justifies amending the Status (Pretrial Scheduling) Order issued in
15 this action. Therefore, Mack's motion is denied.¹

16 IT IS SO ORDERED.

17 DATED: August 4, 2005

18 /s/ Garland E. Burrell, Jr.
19 GARLAND E. BURRELL, JR.
20 United States District Judge

21 ¹ Mack argues that the factors set forth in United States
22 v. Flynt, 756 F.2d 1352 (9th Cir. 1985), ("Flynt factors"), dictate
23 that this action should be stayed until the State Case is resolved.
24 In United States v. Flynt, a criminal case, the Ninth Circuit
25 identified four factors that appellate courts consider when
26 reviewing a denial of a request for a continuance. The Flynt
27 factors do not support granting Mack's motion.

28 Mack also contends that its motion should be granted
since "The claims involving subcontractors [and Plaintiff's claim
for attorney's fees] are not ripe until the State trial has
concluded." (Def.'s Mot. at 7.) However, Mack's argument is
unavailing since Mack has not shown how Plaintiff's claims for
collateralization and indemnification do not constitute a "live
case or controversy." Clinton v. Acequia, Inc., 94 F.3d 568, 572
(9th Cir. 1996).